IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 368

CENTRAL MARKETING SALES, LTD., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Central Magazine Sales, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on February 16, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (p. 1a, *infra*) is reported at 373 F. 2d 633. The opinion of the District Court for the District of Maryland (p. 5a, *infra*) is reported at 253 F. Supp. 485.

JURISDICTION

The judgment of the Court of Appeals (p. 4a, *infra*) was entered on February 16, 1967. On May 6, 1967, the Chief Justice signed an order extending the time for filing this petition for writ of certiorari to and including July 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional standards of obscenity, as enunciated in *Roth* v. *United States*, 354 U.S. 476, and related decisions, must be modified in the context of an *in rem* libel proceeding so as to encompass all possible uses of the alleged obscene matter.

2. Whether certain imported magazines containing pictures of undressed men and women, in the context of a customs libel against the magazines themselves under 19 U.S.C. § 1305(a), can be considered obscene under federal constitutional standards, particularly in the absence of any claim or proof that they would be available to juveniles, or that they would be obtrusively thrust upon unwilling individuals, or that they would be distributed by means of pandering or sexual exploitation.

3. Whether the administrative and judicial scheme authorized by Congress in 19 U.S.C. § 1305(a) for resolution of the question whether material sought

to be imported into the United States is obscene, as here applied to justify a prolonged administrative seizure without an immediate judicial determination as to obscenity, constitutes an unconstitutional prior restraint upon the importation and distribution of the material in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I, Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Title 19, United States Code, Section 1305(a):

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided: and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right or review as in the case of ordinary actions or suits.

STATEMENT OF THE CASE

On February 3, 1966, two separate shipments of magazines imported from Denmark arrived in the port of Baltimore, Maryland. The first shipment consisted of 3000 copies of "Review International", Vol. 6; the second shipment consisted of 1000 copies of "International Nudist Sun", Vol. 16. Both shipments were consigned to custom house brokers on behalf of the claimant and petitioner herein, Central Magazine Sales, Ltd. The magazines in both instances contained

full page pictures of undraped male nudes, interspersed with various short articles on health and nudism. They will be referred to herein as the "male nudist magazines."[1]

Five days later, on February 8, 1966, a similar importation arrived in Baltimore from Denmark, composed of 392 copies of a magazine entitled "Exclusive". This shipment was also consigned to brokers on behalf of the claimant-petitioner. This magazine, denominating itself an "international Art Magazine", contained full page pictures of nude and semi-nude women. No articles of textual matter, other than a brief introductory statement, appeared in the magazine.[2]

After about two weeks of administrative consideration of these magazines by customs officials, they were referred to the United States Attorney in Baltimore for the institution of libel proceedings. On February 17, 1966, those proceedings were actually instituted. Having been given notice, the petitioner-claimant filed answers to the respective libels. Thereafter, on March 9 and 10, 1966, a trial without jury took place before Chief Judge Thomsen. Both the Government and the petitioner produced witnesses and examined and cross-examined them.

On April 4, 1966, the District Court entered an extensive written opinion (pp. 5a-28a, *infra*) and an

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[1] A copy of "Review International" was introduced into the record as the Government's Exhibit 2; a copy of "Interdational Nudist Sun" was introduced as the Government's Exhibit 3.

[2] A copy of "Exclusive" was introdnced as the Government's Exhibit 1.

order (p. 28a, *infra*) finding that the three magazines were obscene within the meaning of 19 U.S.S. § 1305 and ordering their destruction on May 6, 1966. The District Court also concluded in its opinion and order that § 1305 on its face is not unconstitutional and that § 1305 had not been applied unconstitutionally in this instance.

Thereafter the Fourth Circuit affirmed the determinations of the District Court. It held that § 1305 was constitutional, both "facially and as applied in this case." And it agreed that the magazines were obscene, mainly for "the reasons stated by the District Court as supplemented by our opinion in *Potomac News*." See *United States* v. *Potomac News Co.*, 373 F. 2d 635 (C.A. 4), now pending before this Court on certiorari, No. 164, Oct. Term, 1967.

A. The Procedural Events

As already indicated, the shipments of the three magazines began arriving in Baltimore on February 3, 1966. On that date the male nudist magazines began their long journey through the inspection procedures established by customs officials in the port of Baltimore. This journey is detailed in the record at Tr. 54-207, *passim*.

The first customs official to inspect the magazines was the Line Examiner, who determined that their admissibility was questionable and therefore referred them to the Customs Appraiser.

The Customs Appraiser, the second customs official to inspect them, apparently concurred in the Line Examiner's judgment and therefore passed them on to

the third inspection level, a group of customs officials located in the Collector's Office called "The Obscene Literature Committee." This committee also questioned the legal propriety of these publications. The exhaustion of this three-step procedure consumed five days.

The male nudist magazines were then forwarded to the Bureau of Customs in Washington, D. C., where for the fourth time their legal propriety was examined and there it was decided the magazines should be forwarded to the United States Attorney in Baltimore for determination of whether libel proceedings should be instituted. However, before these magazines were submitted to the United States Attorney for the institution of libel proceedings, they were technically seized by the customs officials and impounded. See Tr. 144-145.

On February 17, 1966, *two weeks* after the date of their arrival, these publications failed to survive the fifth inspection level and libel actions were instituted.

The petitioner-claimant never received notice of the confiscation of these magazines until February 19, *sixteen days* after their arrival in the United States. The petitioner was then given the opportunity to show cause on or before March 8th, 1966, why these publications should not be forfeited. On February 26, the day after counsel had been engaged, a letter was sent to the Clerk of the United States District Court for the District of Maryland demanding an immediate trial of each of the libel actions pending against the publications.

On March 4, 1966, at a pre-trial conference conducted by the Hon. Roszel C. Thomsen, the demand for an

immediate trial was repeated by counsel for the petitioner. The United States Attorney was unable to proceed to trial until March 9th, 1966, *thirty-four* days after the publications' arrival in the United States. The trial lasted two days.

On March 21st, the day the United States Supreme Court decided the *Mishkin, Ginzburg* and *Fanny Hill* cases and forty-six days after the arrival of the magazines, these three actions were still undecided.

On or about March 22nd an application was made by petitioner's counsel to Judge Thomsen for permission to submit a supplemental brief discussing the impact of the *Mishkin, Ginzburg* and *Fanny Hill* cases upon the cases at bar. This permission was obtained on or about March 24th, and on March 27th the supplemental brief was forwarded to Judge Thomsen's chambers.

On April 4, 1966, Judge Thomsen decided that the male nudist magazines and "Exclusive" were obscene.

It thus took exactly sixty days, under the procedures established by the customs officials, for the petitioner to get a determination that these publications were obscene.

The chronology of the journey of "Exclusive" through these complex inspection procedures is identical to that of the male nudist magazines, except that the trip was shortened by five days because of its later arrival in the United States on February 8, 1966. But it still took fifty-five days to determine the legal propriety of "Exclusive."

There follows a chart which traces the travels of these publications through the maze of the United States Customs inspection procedures:

	Date	Number of days Expired from Date of Arrival and First Inspection.
Male nudist publications received entry number:*	Feb. 3rd	-0-
Inspections conducted by (1) Line Examiner, (2) Appraiser, and (3) the Obscene Literature Committee:	Feb. 3rd through Feb. 8th	5 days
Publications submitted to Bureau of Customs in Washington:	Feb. 8th	5 days
Seizure of publications by Customs officials:	Feb. 11th	8 days
Submitted to United States Attorney to determine propriety of libel proceedings:	Feb. 14th	11 days
Libel proceedings instituted:	Feb. 17th	14 days
Notice to appellant of libel proceedings:	Feb. 19th	16 days
Date libel proceedings returnable:	Mar. 8th	33 days
Commencement of trial:	Mar. 9th	34 days
Decision of Court:	Apr. 4th	60 days

* The receipt of the entry number starts the inspection procedures.

B. The Government's Proof of Obscenity

Other than the witness produced by the Government to prove the ponderous procedures used in evaluating the legal propriety of an imported publication, there was only one witness who testified on the subject of the publications' alleged obscenity. Doctor Manfred S. Guttmacher, a psychiatrist and Chief Medical Officer of the Supreme Bench of Baltimore City, testified that in his opinion the male nudist publications would appeal "to all homosexual males, all males who have ever been actively homosexual; I think, also, to some latent homosexual males". Tr. 21. When asked what he understood prurient interest to mean, he replied:

> "Something which excites the sexual position; something which is lascivious, I think." Tr. 21.

Doctor Guttmacher, after examining "Exclusive," was unable to render any opinion about its prurient appeal to any one.

Both the Government and the defense psychiatrists agreed that Kinsey's figures disclosing that 37% of the male population experience one or more homosexual episodes after adolescence was reasonably accurate. This group was used by both psychiatrists in rendering their opinions.

When Doctor Guttmacher was asked on cross-examination if all of the 37% would be sexually excited by the nudist publications, he replied:

> "I would have no way, really, to answer that question. I would think a considerable percentage of them would be; but I would think it is quite pos-

sible that a fairly large segment of them would not be. But I cannot give you percentages on that.

Q. You think there would be a large percentage of them who might be affected, of that larger group?

A. I think there might be a large percentage; yes. I think there would be a significant percentage who would not be." Tr. 27-28.

Doctor Guttmacher, with commendable candor, admitted that he had made no attempt to validate these figures and that he was simply "theorizing". Tr. 31.

C. The Petitioner's Proof

Doctor Jonas R. Rappaport, a psychiatrist, testified on behalf of the defense. He is the Chief Medical Officer of the Circuit Court for Baltimore County, a member of the Governor's Commission on the Review of Criminal Law, and President of the Maryland Psychiatric Society. He testified that the three publications at bar would not appeal to the average person's prurient interest. Tr. 211.

Of the 37% group of homosexuals found by Kinsey, Doctor Rappaport felt that only a "very small percentage of these people would be sexually stimulated to any extent by these two [male nudist] magazines; by a small percentage, perhaps, of that 37%, 10 or 20% might be." Tr. 219.

Offered on behalf of the petitioner were other publications which have been approved by U.S. Customs as not being obscene. Also offered were other books

similar to the books at bar which had been adjudicated not obscene:

Deft's. Exhibit Number	Title of Exhibit
3	Solis No. 83
4	Sun and Sport No. 25
5	Playgirl No. 20
6-A	Phyrne No. 12
6-B	Nymphs No. 23
7	Revue No. 62
8	Revue No. 60
9	International Nudist Sun No. 11
11	Sun and Sport No. 16
12 thru 22	International Nudist Sun, Nos. 8, 10, 9, 12, 4, 2, 5, 11, 7, 6, 13.

The publications above enumerated, which were received by the District Court and considered by it in rendering its opinion, are virtually identical to the publications here involved. Each had specifically been approved by the United States Customs officials, both before and after the institution of the libel proceedings against the instant magazines. They were offered to the Court as some evidence of contemporary community standards and also as identical material which had been administratively adjudicated as not obscene.

Solis No. 83, *Sun and Sport No. 25* and *Playgirl No. 20*, cleared customs contemporaneously with the institution of the instant libel suits. *Solis 83* was held for 16 days, *Sun and Sport No. 25* was held for 21 days and *Playgirl No. 20* was held for 14 days. This would seem to refute the testimony of the Customs Agent during the trial that the normal delay of holding a magazine for inspection purposes is only a couple of days.

Revue No. 37, (Def't. Ex. 10) was found not obscene in the case of *Royal News Company* v. *Dewey Schultz*, in the United States District Court for the Eastern District of Michigan. Tr. 260.

International Nudist Sun No. 2 and *Nudist Times*, (Def't. Ex. 23-A thru F, R. p. 66), were found not obscene in *Commonwealth of Pennsylvania* v. *Robert Platt and William Morris*, by Judge Aldisert of the Pennsylvania Court of Quarter Sessions, Allegheny County. The *International Nudist Sun No. 2*, found not obscene in the Pennsylvania case under the *Roth* test, is virtually identical to the two male nudist magazines here involved.

Sunshine and Health and *Sun Magazine* were found not obscene in *Sunshine Book Company* v. *Summerfield*, 355 U.S. 372 (Def't. Ex. 25).

One, the homosexual magazine, was found not obscene in *One, Inc.* v. *Olesen*, 355 U.S. 371 (Def't. Ex. 26).

There was also offered on petitioner's behalf a group of exhibits, representing material similar to the magazines here in issue, which had been purchased in public book stores in Baltimore. Def't. Ex. 27-A thru S.

REASONS FOR GRANTING THE WRIT

1. THE RULING BELOW RAISES SIGNIFICANT QUESTIONS AS TO THE STANDARDS TO BE APPLIED UNDER 19 U.S.C. § 1305 IN DETERMINING THE OBSCENITY OF PRINTED MATTER SOUGHT TO BE IMPORTED INTO THE UNITED STATES.

The Fourth Circuit has here ruled (p. 3a, *infra*) that the magazines in question, which were sought to be imported into the United States, are obscene within the meaning of 19 U.S.C. § 1305 for "the reasons stated by the District Court as supplemented by our

opinion in *Potomac News.*" See *United States* v. *Potomac News Co.*, 373 F. 2d 635 (C.A. 4), now pending before this Court on petition for writ of certiorari, No. 164, Oct. Term 1967.

In other words, the Fourth Circuit has adopted *in toto* the District Court's view (see pp. 17a-28a, *infra*) that the guidelines for determining the obscenity issue under § 1305 are those set forth in the unrelated context of *Roth* v. *United States*, 354 U.S. 476, 489, as elaborated in subsequent cases. See *Jacobellis* v. *Ohio*, 378 U.S. 184, 191; *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418; *Mishkin* v. *New York*, 383 U.S. 502, 508-509. Finding that the District Court's conclusions were abundantly supported by the record, the Fourth Circuit has therefore ruled:

(a) The male nudist magazines "have very strong prurient appeal to almost all exclusively homosexual or bisexual males and some prurient appeal to a large percentage of latent homosexuals and some adolescent males," as well as to a few female adolescents. See p. 20a, *infra*. The Fourth Circuit added its own conclusion that these magazines appeal to homosexual males under the *Mishkin* "adjustment" of the *Roth* prurient appeal standard, and stated that they "were designed primarily for the exploitation of that interest." See p. 3a, *infra*. The *Exclusive* magazine containing pictures of nude and semi-nude females was found to "appeal to the prurient interest of the average male, and particularly to the prurient interest of the adolescent male." See p. 20a, *infra*.

(b) The male nudist magazines, while admitted to be "borderline material" in the light of "the Supreme

Court cases," were found to be "patently offensive," at least until "the binding authorities are clarified." See pp. 26a-27a, *infra*. That offensiveness was found to reside in the highlighting of the male genitalia in the pictures. And the revelation of the genital areas of the pictured females was held to render the *Exclusive* magazine "patently offensive." See p. 26a, *infra*.

(c) The male nudist magazines were found to be "utterly without any artistic significance or other redeeming social value," despite the admittedly "innocuous" textual matter dealing with the values of sunbathing and nature-living. See p. 28a, *infra*. And *Exclusive* magazine, containing the female pictures, was likewise found to be "utterly without social importance or value." See p. 27a, *infra*. The brief introductory statement in that magazine, stating that its design was "exclusively to furnish serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as a substitute," was found to be a "subterfuge."

In thus finding these magazines "obscene" under the *Roth* standards for purposes of § 1305, the Fourth Circuit has created several significant problems—of both constitutional and statutory dimensions—warranting this Court's full consideration. And the constantly recurring nature of those problems, stemming from the constant flow of books, magazines and other materials into the United States from other lands, makes the questions here presented of far more than parochial concern to this petitioner alone.

A. Can the Roth Standards Be Applied Without Modification in Determining the Issue of Obscenity in the Context of an in Rem Libel Proceeding?

In determining the obscenity issue, the Fourth Circuit approved the application of the *Roth* standards without considering whether any modification or alteration of those standards was necessitated by the *in rem* nature of the instant libel proceedings. Those standards were originally developed by this Court for use in actions *in personam*. See *Roth* v. *United States*, 354 U.S. 476. But in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420-421, involving an *in rem* action against a book, Mr. Justice Brennan announced a significant qualification of the *Roth* standards as applied to *in rem* proceedings:

> In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. *All possible uses of the book must therefore be considered*, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value. [Emphasis added.]

In other words, when viewing a book or magazine in the abstract atmosphere of an *in rem* proceeding, the *Roth* standards of obscenity must be altered and expanded to include all possible uses of the material. Just as the "social importance" criteria was expanded in *Memoirs* to cover all conceivable uses, so too must

the "prurient interest" and "patent offensiveness" concepts be enlarged to encompass all conceivable recipients and uses of the material. If valid uses can be discerned, if there be legitimate interests and values involved in the potential distribution of the material, then those uses, interests and values are entitled to First Amendment protection against censorship or destruction of the material. And those who publish or distribute on the basis of such uses, interests and values, as the *Memoirs* decision indicates, cannot be deprived of their publishing or distributing rights.

But neither the Fourth Circuit nor the District Court made the slightest effort in this proceeding to inject the *Memoirs* notion of "all possible uses" into the *Roth* standards for purposes of assessing in the abstract the obscenity of the magazines involved in the customs seizure. Instead, these courts contented themselves with finding that the magazines would appeal "primarily" to homosexuals, or that the pictures would appeal "to a large percentage" or to "some" of the described groups. And while emphasizing the genitalia displays as indicating that the magazines were patently offensive and utterly without redeeming social importance, the courts below conceded that nudity per se is neither offensive nor without some social importance and that the male nudes here involved were no more than "borderline material." Such qualified and limited determinations suggest that there very well may be legitimate uses for the magazines in question. Nothing that the courts below found can eliminate the possibility that some non-deviate groups—be they artists, photographers, sociologists, nature-lovers, or

serious students of foreign publications and culture—may find some value in these magazines, being neither offended nor pruriently aroused by the pictures. If there be such groups, the *Memoirs* rule would dictate that these magazines should be allowed admission into the United States for distribution and sale to those groups.

It accordingly becomes appropriate for this Court to explore with precision the modifications of the *Roth* standards which must be made in assessing the obscenity of foreign publications subjected to *in rem* seizure proceedings. The basic question to be answered is whether there can be a constitutionally permissible finding of obscenity in such an abstract libel proceeding without clear and convincing proof by the Government that absolutely no legitimate interests or values can conceivably adhere to the seized material.

B. Can Material Found To Be Obscene Under the Roth Standards Be Totally Barred From Importation and Distribution, Including That Which May Not Be Available to Juveniles, or Obtrude Upon Individual Privacy, or Involve Any Kind of Pandering or Sexual Exploitation?

In finding these magazines obscene under the *Roth* standards, the Fourth Circuit has approved the indiscriminate destruction of all the magazines without regard to whatever legitimate values and interests some groups might possess. And it has done so in the absence of any claim or proof that, if distribution were allowed on the basis of such values and interests, the material might or would be available to juveniles, or might or would intrude upon the privacy of those who would be offended by the magazines, or might or would

be distributed by means of pandering or exploiting the sexual aspects of the magazines.[8]

Thereby is raised a most serious constitutional and statutory question, one that is intimately related to the problem just discussed as to the necessary adjustment of the *Roth* standards to an *in rem* libel proceeding. If there are found to be legitimate values and interests through application of the adjusted *Roth* standards, how can the constitutionally necessary respect be paid those values and interests if total and indiscriminate destruction of the materials has been ordered? In the absence of an invasion of some other recognized governmental or private concern, can a distribution designed to serve those values and interests be denied simply because the material is otherwise thought by some people to be offensive, pruriently appealing or without social value?

The answer to those questions has been suggested in the recent *per curiam* ruling of this Court in *Redrup* v. *New York*, 386 U.S. 767. The Court there ruled that under either the *Roth* standards or the other views held by certain members of the Court "the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem*." But in permitting the distri-

[8] Cf. the situation in *Potomac News*, now pending before this Court, No. 164, Oct. Term 1967. There apparently was evidence in that case as to the intended and extremely high sale prices of the imported magazines; and the prospective distributor had included the magazines there involved in what was described as "a catalogue of homosexual material." No such evidence or catalogue is here involved.

bution of those publications, which in one degree or another pervasively treated sexual matters, the Court emphasized that (a) there was no claim "that the statute in question reflected a specific and limited state concern for juveniles," (b) there was no "suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," and (c) there was no "evidence of the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*, 383 U.S. 463."

Redrup thus seems to say that once a publication has survived the constitutional tests of obscenity it is not to be denied distribution that is designed to satisfy legitimate values and interests. Only that distribution which in some manner is considered harmful to juveniles, or intrudes upon individual privacy or involves pandering or sexual exploitation may be circumscribed.

Application of the *Redrup* rule would seem peculiarly appropriate in an *in rem* customs seizure proceeding, deveid as it is of all issues save that of the abstract obscenity of the seized material. The seizure statute, 19 U.S.C. § 1305(a), is in no way designed to reflect a limited governmental concern for juveniles. It is not written so as to bar importation or distribution of that which may be obtrusively thrust upon unwilling individuals. Nor is the statute directed in any way toward the sort of pandering condemned in the *Ginsburg* case. Section 1305 simply bans the importation of any "obscene" matter. And that proscription must be resolved in any given case prior to any actual distribution or sale of the seized materials. The material must be viewed in the abstract, as in the *Memoirs* case. Once the material has been found non-obscene

in accordance with the *Roth* standards, as adjusted to fit such an *in rem* and abstract proceeding, *Redrup* would indicate that the materials may not then be destroyed or denied distribution simply because of the sexual aspects contained therein. If the subsequent distribution does involve any of the three elements mentioned in *Redrup*, it is not a matter of concern or even conjecture in a § 1305 proceeding. At that later time federal or state authorities may take whatever action is constitutionally permissible to restrict distribution techniques thought to be harmful.

Consideration of the implications of the *Redrup* ruling in the context of a § 1305 seizure proceeding is obviously important and worthy of this Court's attention. Related as that problem is to the question of the necessary adjustment of the *Roth* obscenity standards to such a proceeding, the answers that this Court can provide will serve as a charter long needed to guide customs officials and lower courts in resolving perplexing obscenity problems under § 1305.

C. Did the Lower Courts Properly Apply the Unadjusted Roth Standards of Obscenity?

Even if the Fourth Circuit's application of the unadjusted *Roth* standards to a § 1305 *in rem* proceeding be accepted, serious questions are raised as to the proper use of those standards in this case.

(1) As approved by the Fourth Circuit, the District Court found (see p. 20a, *infra*) that the "prurient interest" standard was satisfied in part by virtue of the appeal of the male nudist magazines to "adolescent males" and to "female adolescents." And the *Exclusive* magazine, containing the nude female pictures,

was found to appeal "particularly to the prurient interest of the adolescent male." See p. 20a, *infra*.

Thus to premise the findings of prurient appeal in terms of adolescents is to adopt a standard rejected time and again by this Court. Normal male and female adolescents are simply sexually immature persons who are considered to be particularly susceptible individuals in terms of sexual stimuli. But in the development of the *Roth* standard of requiring proof of an appeal to the prurient interest of "the average person," this Court took pains to reject that aspect of the *Hicklin* test, *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, that made the impact on the most susceptible persons determinative. *Roth* v. *United States*, 354 U.S. at 489-490. And it was rejected "as unconstitutionally restrictive of the freedoms of speech and press" since it "might well encompass material legitimately treating with sex." *Ibid.*, at 489. In short, a book or magazine may not be banned merely to shield juvenile or adolescent innocence. *Butler* v. *Michigan*, 352 U.S. 380.

The reincarnation of the *Hicklin* test in the proceedings below cannot be justified. And the improper reliance upon the appeals of the three magazines to the prurient interests of perfectly normal adolescents so completely permeated the lower courts' conclusions respecting the *Roth* standard of prurient interest as to necessitate reversal of the judgment below.

(2) The Fourth Circuit, in affirming the District Court's conclusion as to the patent offensiveness of these magazines, necessarily gave approval to the District Court's concession that nudity per se is not offensive and that the male nudist magazines, in light of the decisions of this Court, at the most are "border-

line material." As the lower courts thus impliedly recognized, a serious question is here raised as to the offensiveness of photographic portrayals of nude males and females, portrayals which by their intrinsic nature revealed genital areas.

It was recognized in *Manual Enterprises* v. *Day*, 370 U.S. 478, 490-491 (opinion of Harlan, J.), that "not every portrayal of male or female nudity is obscene" and that photographs of males that highlighted without exposing the genital areas were not indecent in the constitutional sense, however "dismally unpleasant, uncouth and tawdry" they might be. In addition, portrayals of nude men and women, including the exposure of genital areas, have frequently been held non-obscene, at least where no sexual activity or excitation was involved. See, e.g., *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372; *Rosenbloom* v. *Virginia*, 387 U.S. ... (June 12, 1967). The combination of these cases, plus the rather extended administrative history of admitting through customs magazines of virtually identical photographic content, raises a serious question as to the constitutional propriety of the ruling below that the portrayals in question were patently offensive, a question which is not answered by the lower courts' rather frantic effort to find some evidence of sexual excitation in the pictures.

The District Court held that "the binding authorities" of this Court did "not prevent it from holding that the material is patently offensive." See p. 27a, *infra*. Just what those binding authorities were thought to be was not specified. In fact, however, the rulings of this Court point in the precisely opposite direction, thereby augmenting the appropriateness of

clarifying those rulings still further for the benefit of lower courts.

(3) The ruling below that the portrayals of these nude males and females are utterly without redeeming social value raises the ultimate question whether any such portrayal has human or social value. That ruling would seem to incorporate too cynical a view of the individual and his body. When one considers the legitimate pleasure, value and education that some persons may derive from viewing such pictures, who can say that the pictures are utterly without redeeming value? Certainly it is no answer that most people may think such portrayals to be in bad taste or unrefined or even trash. See *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. The problem here is to perceive and appreciate *possible* values—in the context of contemporary community standards and mores—rather than to impose one's own view and evaluation of the pictures in question. But the courts below ignored that problem. It deserves further consideration by this Court.

2. THE RULING BELOW RAISES AN IMPORTANT QUESTION WHETHER 19 U.S.C. § 1305(a), AS HERE APPLIED TO JUSTIFY A PROLONGED ADMINISTRATIVE SEIZURE WITHOUT AN EXPEDITIOUS JUDICIAL DETERMINATION AS TO OBSCENITY, CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT UPON THE IMPORTATION AND DISTRIBUTION OF THE MAGAZINES IN QUESTION.

Many years ago this Court cautioned that a previous restraint upon the dissemination of any form of writing or speech is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697. Chief Justice Hughes there wrote, p. 716, that the historic and constitutional conception of liberty of the press "has meant, princi-

pally, although not exclusively, immunity from previous restraints or censorship." And see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503; *Thomas* v. *Collins*, 323 U.S. 516, 540.

The *Near* case recognized, of course, that "the protection even as to previous restraint is not absolutely unlimited" and that "the primary requirements of decency may be enforced against obscene publications." 283 U.S. at 716. But even as to such exceptional cases where some form of prior restraint might be permissible, the restraint itself "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. And the irreducible requirement for tolerating any system of prior restraints in the exceptional situation is that it be "operated under judicial superintendence and . . . [give assurance of] an almost immediate judicial determination of the validity of the restraint." *Ibid.*, 70.

Tested by that standard, the procedure employed in the instant proceeding in the application of 19 U.S.C. § 1305(a) must be considered constitutionally deficient. And the ruling below sustaining that procedure raises a most significant issue warranting this Court's attention. Section 1305(a) by its terms contains no requirement of an immediate judicial hearing as to the obscenity issue, although nothing in the statutory language precludes such immediate judicial action if the Government agents are so minded to seek it. See *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 915-919 (S.D.N.Y.). But even assuming that § 1305(a) on its face is constitutional and that it can be applied in a constitutional

manner, its application in this instance was devoid of the prompt judicial superintendence of the obscenity allegation which alone can legitimatize a prior detention, seizure or condemnation of printed matter.

The record here is clear that the magazines in question were seized and withheld from public circulation by customs officials for a period of two weeks following their arrival in Baltimore and prior to the institution of judicial proceedings. The seizure during that period was premised solely on the ex parte administrative determination that the magazines were obscene. And all of that period was presumably devoted to a visual examination by various officials of approximately 72 full page photographs, with short articles interspersed in two of the magazines. Even the slowest of readers should be able to absorb such material within a short period, perhaps a quarter of an hour at the most.

Yet not until four sets of customs officials had devoted 11 days to this process of examination and reexamination and review and more review was the matter transmitted to the United States Attorney in Baltimore for the institution of libel proceedings. Those proceedings were not instituted until February 17, 1966, two weeks after the arrival of the male nudist magazines in Baltimore. Not until February 19 did the petitioner have notice of the filing of these proceedings, the return date being given as March 8. Despite the petitioner's desire for an earlier trial, the United States Attorney was unable to proceed to trial until March 9—some 34 days after the initial arrival of the magazines in Baltimore. And the first and only determination by the District Court of the obscenity of

these publications was not forthcoming until April 4, 1966—some 60 days after the initial importation.[4]

The conclusion that the time taken in administrative examination and discussion prior to judicial action was unreasonably long seems both fair and unavoidable, particularly in light of the nature of the material and its susceptibility to quick perusal and evaluation. The textual matter here involved was, by common consent, brief and innocuous and non-obscene. The critical matter was the photographs, which lent themselves to the quickest possible evaluation.

The fact stressed by the District Court, p. 13a, *infra*, that the photographs in question are "almost timeless" in nature and not likely to lose much of their value if there be a substantial delay in judicial determination cannot serve as an excuse for a prior restraint on their dissemination. While undoubtedly the public interest and the constitutional concern in prompt dissemination is greater as to some materials than as to others, the applicability of the prior restraint doctrine has not heretofore been made dependent upon the "timeless" quality of the materials involved. The so-called "girlie" magazines, nudist magazines, treatises and manuals on sex, photography magazines, cartoon and joke books, and still photographs seized in *Marcus* v. *Search Warrant*, 367 U.S. 717, can hardly be described as less "timeless" than the magazines here involved. Yet the Court there outlawed the seizure program because *inter alia* there was "no limitation on the time within which [judicial] decision must be made" and

[4] Petitioner did, of course, request leave to file a supplemental brief with the District Court, after trial, to discuss the impact of the *Ginsburg*, *Mishkin* and *Memoirs* cases. But the petitioner forwarded the brief to the court three days after leave was granted.

"in fact over two months elapsed between seizure and decision." 367 U.S. at 737.[5]

That the period of detention here was unreasonably long is a conclusion fortified by a comparison of the time periods held to be inordinately long, thereby constituting an invalid prior restraint on publication, in other situations before this Court. See, e.g., the two-month period between the seizure of more than 280 publications and the judicial decision as to the obscenity thereof in *Marcus* v. *Search Warrant, supra;* the seven-week period between the seizure of 31 paperback novels and the judicial determination of their obscenity in *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 213; and see also the three to four month delay between the seizure of three different books and the institution of libel proceedings in *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 915 (S.D.N.Y.). Such a comparison lends weight to the conclusion that the delays in this proceeding were not consistent with the constitutional necessity of preserving the status quo prior to public dissemination "for the shortest fixed period compatible with sound judicial resolution." *Freedman* v. *Maryland,* 380 U.S. 51, 59.

Moreover, the action of the customs officials—after the critical events in the instant proceeding—in changing the procedures in order to obtain a more prompt

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[5] In *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911 (S.D.N.Y.), one of the books sought to be imported was DeSade's "Justine"—originally published in Paris in 1791. A delay of three to four months to permit customs officials to read and evaluate this 175-year old book, which might be described as "timeless," was held to be unreasonable and to constitute improper prior restraint.

judicial determination of the obscenity issue (see pp. 13a-15a, *infra*) is tantamount to a confession that the procedures theretofore employed and actually followed in this case were inadequate. And that change serves to overcome any plea of administrative overwork or burden in support of the undue lag in this instance.

The decision below presents an occasion for this Court to remind customs officials that § 1301(a) cannot be utilized to impose an invalid prior restraint on imported magazines. The constitutional requirement of an "immediate judicial determination of the validity of the restraint" must again be reinforced by the grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment and opinion of the Fourth Circuit should be granted.

Respectfully submitted,

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July 14, 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,600.

UNITED STATES OF AMERICA, *Appellee,*

versus

Claimant (CENTRAL MAGAZINE SALES, LTD.) of 392 copies of a magazine entitled "Exclusive," 3600 copies of a magazine entitled "Review International," Vol. 6, and 1000 copies of a magazine entitled "International Nudist Sun," Vol. 16, *Appellant.*

Appeal From the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued June 20, 1966. Decided February 16, 1967)

Before Haynsworth, Chief Judge, and Sobeloff and Boreman, Circuit Judges.

Herald Price Fahringer (Robert Eugene Smith on brief) for Appellant, and Fred Kelly Grant, Assistant United States Attorney, (Thomas J. Kenney, United States Attorney, and Arthur G. Murphy, First Assistant United States Attorney, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

The question for decision is the propriety of the seizure and destruction, under a judicial decree, of magazines containing collections of pictures of undressed men and women. The claimant, which sought to import the magazines into this country, has appealed, contesting the constitutionality of the governing statute, 19 U.S.C.A. § 1305, and the finding of obscenity. We affirm.

On February 3, 1966, 3600 copies of *Revue International,* Vol. 6, were landed in Baltimore from Denmark. On the same day 1000 copies of *International Nudist Sun,* Vol. 16, were landed in the same port. Five days later, on Febru-

ary 8, 1966, 392 copies of *Exclusive* were landed in Baltimore, again, from Denmark. All were consigned to customhouse brokers on behalf of Central Magazine Sales, Ltd., the claimant.

On February 14, 1966, eleven days after the arrival of *Revue International* and *International Nudist Sun* and six days after the arrival of *Exclusive*, all three magazines were referred by Customs to the United States Attorney for the District of Maryland. Libels were filed on February 17, 1966. The cases were tried on March 9th and 10th, and finally decided on April 4, 1966. While the District Court's opinion was in preparation, the Supreme Court decided *Mishkin*,[1] *Ginzburg*,[2] and *Memoirs*,[3] which resulted in a request for permission to prepare and submit supplemental briefs.

Largely for the reasons stated by the District Court in its very comprehensive opinion in this case,[4] we have today held § 1305 to be constitutional as applied in this context.[5] The entire interval between entry of the magazines and the final decree of the District Court was sixty days, here, but the District Court was confronted in this case with important and novel questions of constitutional law. Earlier adjudication accompanied by an enlightening opinion could not reasonably have been expected.

For the reasons stated by the District Court as supplemented by us in *Potomac News*, we hold § 1305 constitutional, facially and as applied in this case.

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[1] Mishkin v. New York, 383 U.S. 502.

[2] Ginzburg v. United States, 383 U.S. 463.

[3] A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413.

[4] United States v. 392 Copies of Magazine Entitled "Exclusive", D.C. Md., 253 F. Supp. 485.

[5] Potomac News Company, Inc. v. United States, 4 Cir. 378 F. 2d 535 (decided this day).

Revue International and *International Nudist Sun* are collections of photographs of undressed males. These two magazines are comparable in all respect to *Hellenic Sun Number Two*, which we hold today in the *Potomac News* case to be obscene. Here, the late Dr. Manfred S. Guttmacher testified for the Government, as he did in the later trial of the *Potomac News* case. The claimant in this case also offered the testimony of a psychiatrist, Dr. Jonas R. Rappaport. Though the psychiatrists differed somewhat in their estimates of the proportion of the 37% of all adult males, who are estimated to have had at least one homosexual contact after adolescence, for whom these magazines would have a prurient appeal, they were in general agreement that the magazines would have such an appeal for practicing male homosexuals. The Court also found, and the finding is supported by the record, that the magazines would have a prurient appeal to many adolescent males and to some females, though the proportion of women who would be strongly stimulated by such erotica is small, while adolescent females would find the material shocking and frightening.

The Court's finding that these magazines would have a prurient appeal to male homosexuals and were designed primarily for the exploitation of that interest is abundantly supported by the record.

For the reasons stated by the District Court as supplemented by our opinion in *Potomac News*, we uphold the finding that the two male nudist magazines are obscene.

We agree, also, that *Exclusive* is obscene.

Exclusive is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the public area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order

to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: the model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.

We agree with the District Court that these apparently unretouched pictures of young women, posed as they are, are patently offensive and that the magazine *Exclusive* is obscene.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,600

UNITED STATES OF AMERICA, *Appellee,*

vs.

CLAIMANT (CENTRAL MAGAZINE SALES, LTD.), ETC., *Appellant*

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed
Feb. 16, 1967
MAURICE S. DEAN, *Clerk*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civl No. 17060

UNITED STATES OF AMERICA

v.

392 Copies of a Magazine Entitled "EXCLUSIVE"

Civil No. 17065

UNITED STATES OF AMERICA

v.

3600 Copies of a Magazine Entitled "REVIEW INTERNATIONAL", Vol. 6

Civil No. 17066

UNITED STATES OF AMERICA

v.

1000 Copies of a Magazine Entitled "INTERNATIONAL NUDIST SUN", Vol. 16

Filed: April 4, 1966.

Thomas J. Kenney, United States Attorney, Arthur G. Murphy and Fred K. Grant, Assistant United States Attorneys, of Baltimore, Maryland, for Plaintiff.

Robert Eugene Smith, of Baltimore, Maryland, and Herald P. Fahringer, of Buffalo, New York, for claimant.
Thomsen, Chief Judge

In these consolidated proceedings under section 305 of the Tariff Act of 1930, 19 U.S.C.A. 1305,[1] the government seeks the forfeiture, confiscation and destruction of 392 copies of a magazine entitled *Exclusive*, 3600 copies of a magazine entitled *Review International No. 6*, and 1000 copies of a magazine entitled *International Nudist Sun No. 16*, imported from Denmark, on the ground that they are obscene material, the importation of which is prohibited by section 1305. Claimant contends that the material is not

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[1] Section 1305 of Title 19, U.S.C.A., provides in pertinent part:

"All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing * * * or other article which is obscene or immoral, * * * No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles * * * shall be subject to seizure and forfeiture as hereinafter provided * * *.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary action or suits."

obscene, that section 1305 is unconstitutional on its face,[2] and that section 1305 is unconstitutional as applied in these cases.[3]

PROCEDURE

Proceedings in the Case. On February 3, 1966, two separate shipments consisting respectively of 3600 copies of *Review International No. 6* and 1000 copies of *International Nudist Sun No. 16*, imported from Denmark and consigned to custom house brokers on behalf of claimant, Central

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[2] Claimant contends that section 1305 is unconstitutional because:

"(a) Its invocation in the case at bar abridges the respondent's right to freedom of speech and press under the First Amendment to the Constitution of the United States.

"(b) It empowers government officials to seize and exclude imported magazines suspected of being 'obscene' and to do so prior to any judicial determination that they are, in fact, 'obscene'.

"(c) It empowers government officials to seize and exclude imported magazines preceding an advisory determination of their 'obscenity'.

"(d) It allows suppression of reading material pending a judicial determination which may be excessively delayed."

[3] Claimant contends that section 1305 is unconstitutional as applied and invoked in these cases because:

"a) From the time of the seizure of the above entitled publications there has been no judicial scrutiny of said publications or advisory hearing to determine their character and nature.

"(b) That since the seizure of the above entitled publications an inordinate amount of time has expired wherein their distribution has been unreasonably and unconstitutionally restrained in violation of the provisions embodied in the First Amendment to the United States Constitution.

"(c) It has been unconstitutionally applied because commencement of the libel proceedings was delayed for an inordinate amount of time and further the libel proceedings have been delayed unreasonably."

Magazines Sales, Ltd., were brought from the ship to the Appraisers' Stores in Baltimore after the bills of lading had been delivered to Customs officials by the brokers for clearance through Customs. Entry numbers were assigned on the same day. On February 8, 392 copies of *Exclusive* were similarly imported and entered. The shipments were examined promptly by the line examiner to determine whether any duty was payable, and whether any of the material was inadmissible for a variety of statutory reasons, including obscenity and violation of copyright.[4] The line examiner thought that the magazines were probably obscene and referred them to the appraiser, in accordance with established procedures. The appraiser likewise felt that the material should be considered for possible forfeiture and referred the matter to the Obscene Literature Committee, a group of Customs officials in Baltimore, again in accordance with established procedures.

Thereafter, if the Committee also believed the material to be obscene, it would ordinarily have been seized or detained[5] pending further administrative proceedings under 19 C.F.R. § 12.40[6] before it was referred to the United States Attorney for the institution of forfeiture proceed-

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[4] See note 13, *infra*.

[5] See discussion in *United States* v. *One Carton Positive Motion Picture Film*, S.D.N.Y., 248 F. Supp. 373, 376 (1965), quoted in note 15 below. See also *United States* v. *One Book Entitled "The Adventures of Father Silas", et al.*, S.D. N.Y., 249 F. Supp. 911, 913-14 (1966); *United States* v. *18 Packages of Magazines*, N.D. Cal., 227 F. Supp. 198, 206, 208 (1963).

[6] The pertinent portions of 19 C.F.R. 12.40 read as follows:

"(b) Upon the seizure of articles or matter prohibited entry by section 305, Tariff Act of 1930 (with the exception of the matter described in paragraph (a) of this section), a notice of the seizure of such articles or matter shall be sent to the consignee or addressee.

"(c) When articles of the class covered by paragraph (b) of this section are of small value and no criminal intent is

ings. The administrative proceedings in Baltimore would ordinarily not have been significantly different from those described under the heading "The administrative task and procedures in general", *United States* v. *One Book entitled "The Adventures of Father Silas"*, *et al.*, S.D. N.Y., 249 F. Supp. 911, at 913 (January 18, 1966). In that case Judge Frankel held the facts, set out at pp. 914-15, showed that the government had suppressed the books for an unlawfully protracted time. However, as a result of that decision and of other recent decisions,[1] a meeting was held

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apparent, a blank assent to forfeiture, customs Form 4609, shall be sent with the notice of seizure. Upon receipt of the assent to forfeiture duly executed, the articles shall be destroyed if not needed for official use and the case closed.

"• • •

"(e) If the importer declines to execute an assent to forfeiture of the articles other than those mentioned in paragraph (a) of this section and fails to submit, within 30 days after being notified of his privileges so to do, a petition under section 618, Tariff Act of 1930, for the remission of the forefeiture and permission to export the seized merchandise, information concerning the seizure shall be submitted to the United States attorney in accordance with the provisions of the second paragraph of section 305 (a), Tariff Act of 1930, for the institution of condemnation proceedings.

"• • •

"(g) In any case when a book is seized as being obscene and the importer declines to execute an assent to forfeiture on the ground that book is a classic, or of recognised and established literary or scientific merit, a petition addressed to the Secretary of the Treasury with evidence to support the claim may be filed by the importer for release of the book. Mere unsupported statements or allegations will not be considered. If the ruling is favorable, release of such book shall be made only to the ultimate consignee.

"• • •"

[1] Particularly *United States* v. *18 Packages of Magazines*, N.D. Cal., 238 F. Supp. 846 (1964), and *United States* v. *One Carton Positive Motion Picture Film*, S.D. N.Y., 248 F. Supp. 378 (1965), and 247 F. Supp. 450 (1965).

in Washington on February 8, which was attended by representatives of the Department of Justice,[8] the Bureau of Customs and the Post Office Department, to discuss possible changes in the procedure for handling material believed to be obscene. At that meeting it was decided to adopt a new procedure, intended to expedite the proceedings and to eliminate the question whether 19 C.F.R. 12.40 accords with 19 U.S.C.A. 1305.[9] See also 19 U.S.C.A. 1603 and 1604.[10] It was also decided to institute forfeiture

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[8] Including an Assistant United States Attorney from Maryland.

[9] See fn. 7 to *United States* v. *One Book Entitled "The Adventures of Father Silas"*, *et al.*, S.D. N.Y., 249 F. Supp. 911, at 914 (1966).

[10] 19 U.S.C.A. 1603:

"*Same* [*Seizure*], *collector's reports*

"Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the collector or the principal local officer of the Customs Agency Service to report such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction."

19 U.S.C.A. 1604:

"*Same, prosecution*

"It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by collectors and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the prior proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided,

proceedings against *Exclusive*, to seek a prompt disposition of that case, and to adopt new regulations shortly thereafter. The following day it was decided that forfeiture proceedings should also be instituted against *International Nudist Sun No. 16* and *Review International No. 6*. A copy of each of the magazines was, therefore, referred to the United States Attorney in accordance with 19 U.S.C.A. 1305.

On Friday, February 11, a libel was filed against the shipment of *Exclusive*, and the attachment and monition were posted by the United States Marshal on Tuesday, February 15. Also on February 15, libels were filed against the shipments of the other two magazines. The attachments and monitions as to them were posted on February 16. The magazines had been formally seized by Customs, see note 5 above, on February 11 at about the time the first libel was filed. Court orders directing that the Marshal, in addition to his monition in rem, publish notice of the seizures and of the forfeiture proceedings were signed on February 16 in the case of *Exclusive* and on February 17 in the case of the other two magazines.

Meanwhile, Customs had given notice of the libels to claimant, and claimant filed answers to all three libels on February 28. A meeting with the Court was held on March 4, a trial date was set, and the trial began on March 9. Testimony and other evidence were offered by both sides, and the case has been fully briefed and argued.

Discussion of Procedure. Section 1305 of Title 19, U.S.C.A., is set out in note 1, above. The predecessors of

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unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises."

that section have been in the Code for a long time.[11] One which was substantially the same as the present section was held constitutional in *United States* v. *One Obscene Book Entitled "Married Love"*, S.D. N.Y., 48 F. 2d 821 (1931). The present section was held unconstitutional in *United States* v. *18 Packages of Magazines*, N.D. Cal., 238 F. Supp. 846 (1964), but that decision was rendered before *Freedman* v. *Maryland*, 380 U.S. 51 (1965), wherein the Supreme Court stated that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system". 380 U.S. at 58. The Court then summarized the necessary safeguards, as follows: (1) The burden of proof must rest on the censor; (2) no valid final restraint may be imposed except by judicial determination,[12] and any restraint prior to such determination must be designed to preserve the status quo; and (3) a prompt judicial determination must be assured. 380 U.S. at 58-59. In the year since *Freedman*, judges in the Southern District of New York have thrice refused to hold section 1305 unconstitutional on its face, but have required that it be applied in accordance with the tests set out in *Freedman*. See *United States* v. *One Carton Positive Film*, (McLean, J.) 248 F. Supp. 373 (1965), and (Graven, J.) 247 F. Supp. 450 (1965); *United States* v. *One Book entitled "The Adventures of Father Silas"*, (Frankel, J.) 249 F. Supp. 911 (1966). This Court agrees with the decision in each of those cases, and refers particularly to the excellent dis-

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[11] Act of August 30, 1842, c. 270, § 28, 5 Stat. 566; Act of March 2, 1857, c. 63, 11 Stat. 168; Act of March 3, 1883, c. 121, §§ 2491-2493, 22 Stat. 489-490; Act of October 1, 1890, c. 1244, §§ 11-13, 26 Stat. 614-615; Act of August 27, 1894, c. 349, §§ 10-12, 28 Stat. 549; Act of August 5, 1909, c. 6, §§ 9-11, 36 Stat. 86.

[12] Citing *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

cussion of the legislative history in Section II of Judge Frankel's opinion.

Customs admission procedures applicable to different types of publications must embody the safeguards specified in *Freedman*. Reasonable speed must be used to reach an administrative decision that a libel for forfeiture shall be filed, and a judicial determination of the issue of obscenity must be made with reasonable promptness. What is reasonable in the case of one type of publication, however, may not be reasonable with respect to another type. Some material is timely and loses much of its value if there is any substantial delay. Other material, such as that with which we are dealing in these cases, may be almost timeless. The instant cases present no such problems as are involved in the previous scheduling of motion pictures or the need of a student for a particular book.

The procedures condemned by Judge Frankel were established by Customs in an effort to reduce the number of forfeiture proceedings which would have to be brought in the courts, by encouraging administrative disposition before judicial proceedings are begun. Since it appears that those procedures result in unreasonable delays in many cases, the governmental agencies involved have wisely attempted to work out a more expeditious procedure.

The proposed new procedure, which was followed in these cases, meets the tests set out in *Freedman*, particularly when it is recognized that all publications, as well as all other goods which are imported into the United States, must be examined by Customs officials for many different purposes after they are entered and before they are cleared.[13] The evidence in this case indicates that the new procedures

[13] A line examiner must keep in mind over fifty possible questions in connection with each shipment for which clearance is sought. See generally 19 U.S.C.A. chaps. 3 and 4, and 19 C.F.R., Parts 8, 9, 10, 11, 12, 13, 14.

will continue to result in the release of the material with reasonable promptness after entry if either the line examiner or the appraiser passes it.[14] Even if the material is referred to the Obscene Literature Committee, its decision is usually rendered within two days. If the Committee decides to go forward, the matter must be taken up at once with the United States Attorney, who is required by statute immediately to inquire into the facts and forthwith to institute proceedings in the district court unless he decides that the proceedings probably could not be sustained or that the ends of justice do not require that they should be instituted and prosecuted. 19 U.S.C.A. 1604. See note 10, above. Meanwhile, the material will have been seized and held by Customs to await the judgment of the district court, 19 U.S.C.A. 1305, and the importer or his broker will have been notified of the seizure and libel. The seizure by Customs is in the nature of a detention of questionable material pending a judicial adjudication. Such restraint by detention is designed simply to preserve the status quo, i.e., to prevent entrance of the suspect material until the Court has ruled.[15] Negotiations with Customs or the

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[14] The evidence shows that the line examiner usually examines the material the same day it is delivered to the Appraisers' Stores, but that since the line examiner in Baltimore who examines books and magazines also has other items in his line, there may on certain occasions be a delay of one or two days.

[15] In *United States* v. *One Carton Positive Motion Picture Film*, 248 F. Supp. at 876-77, Judge McLean said:

> "* * * To be sure, some initial determination by the customs officials is necessary as to which works are to be held for such a judicial determination. But this is inevitable. The district court cannot reasonably be expected to view each and every one of the thousands of books and pictures and other works which are imported into the United States, most of which, after all, are innocuous. Some screening procedure must be set up. To put this responsibility upon the customs officials is appropriate and in fact it is hard to see how else it could be handled, as a practical matter. But it is the court

United States Attorney looking to a possible settlement of the matter may be conducted either before or after the Marshal serves the monition. An opportunity for such discussion was offered in this case. There is ordinarily no reason why the cases cannot be heard promptly by the court if the parties desire a prompt hearing and there is any real need for speed. In some instances the importer is more anxious to develop his case fully than to secure a prompt decision. The decision in the instant case was delayed because the opinions in *Mishkin* v. *New York*, 383 U.S. 502 (1966), *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* (*"Fanny Hill"*), *et al.* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966), and *Ginzburg* v. *United States*, 383 U.S. 463 (1966), were handed down by the Supreme Court while this opinion was being prepared, and counsel for claimant requested an opportunity to file a supplemental brief. In appropriate cases the material may be released pendente lite in accordance with the provisions of 19 C.F.R. 23.22. See also cases in 19 U.S.C.A. 1605, n. 2 and n. 3.

Conclusion re. Procedure. This Court concludes that section 1305 of Title 19, U.S.C.A., is not unconstitutional on its face and has not been applied unconstitutionally in these cases.

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which makes the ultimate determination. There is no 'seizure' in a final sense unless the court so decides, after a trial by jury, if the claimant wants one. The 'seizure' by the customs authorities is merely a temporary detention."

Mr. Justice Brennan also has discussed the Customs procedure as an example of desirable judicial adjudication as opposed to administrative adjudication. See *Manual Enterprises, Inc.* v. *Day*, *supra*, 370 U.S. at 514-516.

The Material. The so-called "magazine" *Exclusive* is really a picture book containing 34 pictures of nude or almost nude women. In each picture the breasts and pubic area are fully exposed. In some of the pictures the women are wearing garter belts and silk stockings, which focus attention on the pubic area. In some of the pictures the models are posed in lewd attitudes and positions. In several pictures the women are chained to a chair and their wrists are bound.[16] The only written material is on the title page, in English and two foreign langues, and appears verbatim in other "magazines" published by Nordisk Bladcentral, of Copenhagen.[17] The material belies the protestation.

International Nudist Sun No. 16 and *Review International No. 6* each contain 20 posed pictures of well-developed nude men, with the focus in most instances on the penis, which is fingrantly displayed. Although posed in outdoor settings, in few of the pictures are the models engaging in any normal outdoor activities. The articles in both magazines are innocuous, dreary and puerile, and bear little

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[16] The possible sado-masochistic appeal of any of the pictures in *Exclusive* is too slight to be of any importance on any of the questions in this case. In other cases such appeal may be of importance. See the authorities cited in the various opinions in *Mishkin*, 383 U.S. at 509-510, and *Ginsburg*, 383 U.S. 463. *United States* v. *Rees*, D. Md., 193 F. Supp. 849, 852-855 (1961), illustrates the possible dangers inherent in such material.

[17] It reads: "The international Art Magazine is published bi-monthly. Europe's most distinguished photographers have contributed the pictures used in this magazine which has been released by the publishers exclusively to furnish serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as substitute for drawing painting and sculpturing.—Therefore the magazine will be sold only to adults who are serious minded of problems of art and will look on our pictures solely from an aestitical (sic) point of view." The material belies the protestation.

relation to the illustrations.[18] No reference is made to the illustrations in any of the articles.

Discussion. On the issue of obscenity the controlling case is *Roth* v. *United States*, 354 U.S. 476 (1957), as elaborated and in one respect "adjusted" by *Mishkin* v. *New York*, 383 U.S. 502 (1966); *A Book Named "John Cleland's Memoirs of A Woman of Pleasure" et al.* v. *Attorney General of Massachusetts* (the *Fanny Hill* case), 383 U.S. 413 (1966); *Ginzburg* v. *United States*, 383 U.S. 463 (1966); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962); and *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

In the *Fanny Hill* case Mr. Justice Brennan said:

> "We defined obscenity in *Roth* in the following terms: 'Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. at 418.

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[18] In *International Nudist Sun No. 16* the articles are: Prudery in Naturist Clubs; The Art of Correct Breathing; On Forming a Naturist Club; Leisure and Automation; Psyche-Analysis and Physical Health; Learn to Relax and Stay Young; Masculine Hygiene; If You Must Wear Clothes; and Shivers and Goose Pimples. In *International Review No. 6* the articles are: Naturism in winter; Finer focusing; How far will you go for a good skin?; "Nudist Paradise" revisited; Flowers and trees of Christmas; News of nudists (sic); Odds and ends; Moving around; Glassless (sic) nudism; and Spoil yourself. The articles fill approximately one-half of the pages of the two magazines.

(a) Prurient Appeal. Many books, magazines and pictures are directed to the general public, but some are designed for special groups, such as males, females, children, adolescent males, adolescent females, homosexuals,[19] and others.

In *Mishkin*, Mr. Justice Brennan, speaking for the Court, said:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth*, 354 U.S., at 489-490, does not foreclose this holding.* In regard to the prurient-appeal re-

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*"See *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482 (opinion of Harland, J.); Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 72-73 (1960).

"It is true that some of the material in *Alberts* v. *California*, decided with *Roth*, resembled the deviant material involved here. But no issue involving the obscenity of the material was before us in either case. 354 U.S., at 481, n. 8. The basic question for decision there was whether the publication and sale of obscenity, however defined, could be criminally punished in light of First Amendment guarantees. Our discussion of definition was not intended to develop all the nuances of a definition required by the constitutional guarantees."

[19] The psychiatrists were in substantial agreement, based upon Kinsey, that about 4% of all males are exclusively homosexuals, and another 10% are "bisexual", more homosexual than heterosexual, but making a more or less satisfactory adaptation to normal life in the community, including marriage. There is also a group of occasional homosexuals, whose number is hard to estimate, perhaps as high as 18%, probably somewhat lower. Including these groups, nearly 37% of all males have one or more homosexual experiences after adolescence.

quirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons,** it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test." 383 U.S. at 508-509.

** "See generally, 1 American Handbook of Psychiatry (Arieti ed. 1959) 598-604, for a description of the pertinent types of deviant sexual groups."

In *United States* v. *Klaw*, 2 Cir., 350 F. 2d 155 (1965) the government contended that the material appealed particularly to the prurient interest of sexual deviates and also had prurient appeal to the average man. The Court "doubted that any court would take judicial notice of the reaction that deviates—or the average man—might have to such stimuli" as were involved in that case. This court agrees that expert testimony is desirable, if not necessary, to show what reaction deviates would have to almost any type of stimulus. Whether expert testimony is necessary to prove the probable reaction of the average man to various stimuli depends upon the nature of the material. Some may be so esoteric as to require expert testimony; other stimuli, like the pictures of the women in the "magazine" *Exclusive*, are so elemental that the ordinary judge or juror should be able to recognize the nature of their appeal to the average man.

In the instant case both the government and the claimant offered expert testimony with respect to the probable effect of the magazines on various groups in the community. Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore City and Consultant to the American Law Institute in the preparation of the Model Penal Code, testified for the government. Dr. Jonas R. Rappaport, Medical Officer of the Circuit Court for Baltimore County and a member of the Governor's Commission to Study and Review the Criminal Laws, testified for claimant. Dr. Guttmacher's testimony was confined to the two magazines depicting male nudes.

The Court finds from all the evidence, including the testimony of the psychiatrists, that *International Nudist Sun No. 16* and *Review International No. 6* were in fact primarily designed for homosexual males and, to a lesser extent, adolescent males; that the pictures have very strong prurient appeal to almost all exclusively homosexual or bisexual males and some prurient appeal to a large percentage of latent homosexuals and some adolescent males; that to many female adolescents they would be shocking and rather frightening[20] but to a few might have such prurient appeal as to cause masturbation.[21]

The Court finds that the pictures in *Exclusive* would appeal to the prurient interest of the average male, and particularly to the prurient interest of the adolescent male. That was the dominant theme of the material.

(b) Patent Offensiveness. This brings us to the question whether the material so affronts contemporary community

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[20] Which does not tend to prove prurient appeal, but may be considered on the question of whether the material goes so far beyond ordinary community standards as to be patently offensive.

[21] Both psychiatrists agreed that women as a group are not stimulated sexually to the same degree as men by pictures, articles or verbal statements.

standards relating to the description or representation of sexual matters as to be patently offensive.[22]

The standards to be applied in customs cases should be national standards. *United States* v. *One Carton*, 247 F. Supp. at 464. See also *Jacobellis*, 378 U.S. at 195; *Manual Enterprises*, 370 U.S. at 488; *United States* v. *Ginzburg*, 3 Cir., 338 F. 2d 12, 14 (1964), affirmed sub nom. *Ginzburg* v. *United States*, supra.

The Court must first decide whether any evidence, and if so what evidence, may be admitted to prove contemporary community standards. This problem has been discussed in a number of recent cases, which have reached different conclusions.[23]

In *Smith* v. *California*, 361 U.S. 147 (1959), concurring opinions referred to defendant's rights "to enlighten the

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[22] The test with respect to this element was worded as follows by Justice Brennan in the *Fanny Hill* case: "that * * * the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters * * * ". 383 U.S. at 418. In *Manual Enterprises*, Justice Harlan cited the test in the A.L.I. Model Penal Code, "if it goes substantially beyond customary limits or candor in description or representation of such matters". 370 U.S. at 486. Justice Harlan also stated: "It is only in the unusual instance where, as here, the 'prurient interest' appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive." 370 U.S. at 486.

[23] *United States* v. *Ginsburg*, 3 Cir., 338 F. 2d 12 (1964), aff'd 383 U.S. 463; *Womack* v. *United States*, D.C. Cir., 294 F. 2d 204 (1961); *United States* v. *Hochman*, E.D. Wisc., 175 F. Supp. 881 (1959), aff'd 7 Cir., 277 F. 2d 631, cert. den. 364 U.S. 837 (1960); *United States* v. *West Coast News Company, Inc.*, W.D. Mich., 228 F. Supp. 171 (1964); *Manfred* v. *State of Maryland*, 226 Md. 312, 173 A. 2d 173 (1961); *Yudkin* v. *State of Maryland*, 229 Md. 223, 182 A. 2d 798 (1962); *People* v. *Finkelstein*, 11 N.Y. 2d 300, 183 N.E. 2d 661 (1962); *In re Harris*, 56 Cal. 2d 879, 366 P. 2d 305 (1961).

judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts," and that to "exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process." 361 U.S. at 164-65. The A.L.I. Model Penal Code, section 251.4, Obscenity, p. 239, proposes that: "Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible." In the instant case no expert testimony with respect to community standards was offered by either side, nor was there any testimony from the author, creator, publisher or other person from which the material originated.

Claimant did offer three types of evidence: (1) publications which have been held not obscene in certain court trials; (2) publications admitted by Customs officials in Baltimore shortly before and shortly after February 7, 1966, and (3) publications purchased by a former policeman at certain stores on newsstands in Baltimore during the trial. All of this evidence was admitted subject to exception over the objection of the government.

(1) Claimant offered in evidence the items which were held not obscene in *Sunshine Book Co.* v. *Summerfield*, D.C. Cir., 249 F. 2d 114 (1957), 355 U.S. 372 (1958), in *One, Inc.* v. *Olesen*, 355 U.S. 371 (1958), and in two nisi prius cases ** decided before *Mishkin*, *Ginzburg* and *Fanny Hill*. Material involved in adjudicated cases, whether held obscene or not obscene, should always be considered by the Court as illuminating the opinions rendered in those cases,

** *Royal News Co.* v. *Dewey Schultz*, E.D. Mich., unreported, and *Commonwealth of Pennsylvania* v. *Pfaff*, Allegheny County Court of Quarter Sessions of the Peace, #379, December term, 1964.

and the items offered have been so considered here. Whether such material would ordinarily be admitted as evidence in a jury trial or in a trial before the court without a jury need not be decided; various factors would enter into such a ruling in each case. Since this is a test case, the Court has considered the books as evidence. This Court finds that the publications in the present case are more offensive than the material in *Sunshine Book* and *One, Inc.* The material approved in the two nisi prius cases is inconclusive, and entitled to little weight.

(2) It is not necessary to decide whether the material which was passed by customs authorities in Baltimore shortly before or after the material was seized in the instant cases would ordinarily be admissible to prove the national standard. It would never be conclusive, and would ordinarily have little weight. The Supreme Court has insisted that the standard be determined in a judicial proceeding by the court or the jury, with such expert or other evidence as may be appropriate in the particular case. The problem before the Customs officials is a difficult one, complicated not only by the difficulty of interpreting the applicable Supreme Court decisions, but also by recent nisi prius decisions questioning the Customs procedures, which have been discussed above. The Customs officials decided to proceed against the magazines involved in these consolidated cases and to pass certain others. However, both before and after the decisions in *Mishkin*, the Customs officials in Baltimore have filed additional libels involving thousands of copies of other magazines.

In this case the Court has examined all the publications offered in evidence by claimant. Many of the pictures of male nudes in the magazines which have been admitted are generally similar to the pictures in *International Nudist Sun No. 16* and *Review International No. 6*, but they were admitted before the decision of the Supreme Court in *Mishkin*, clarifying the question of prurient appeal to a particular group. Few of the pictures of female nudes

or partly dressed females in the magazines admitted come close to the offensiveness of many pictures in *Exclusive*.

(3) Claimant offered the testimony of a former City policeman, now a private detective, and the magazines he had purchased at a dozen stores or newsstands in the City during the trial and before the decision in *Mishkin*. He had started in "the Block" area and had proceeded to particular stores and newsstands which he and many other Baltimoreans know deal in pornographic material. His testimony indicates that such material is not available at respectable book stores, drug stores, newsstands or other outlets for magazines. It is noteworthy that on the very day this case was argued the proprietor of one of the stores where the detective purchased a magazine was convicted and sentenced to prison in the Criminal Court of Baltimore for selling obscene photographs of nude males.[25] Four of the outlets where the detective purchased magazines were located on "the Block" or adjacent thereto. The standards of "the Block" are not the standards to be applied in this case, any more than the standards of the most strait-laced persons. Material purchased in such specialized outlets has little or no value in determining contemporary community standards. *Ginzburg* v. *United States*, 383 U.S. 463 (1966). Nevertheless, the Court has considered the material purchased by the detective.

None of the opinions in *Mishkin*, *Ginzburg* or *Fanny Hill* discussed at length the question of patent offensiveness. In *Manual Enterprises* there was no majority opinion, but Justice Harlan, speaking for himself and Justice Stewart, included a description of the material in a footnote to his opinion, 370 U.S. at 489, fn. 13, and said:

"* * * Our own independent examination of the magazines leads us to conclude that the most that can

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[25] The Court examined these photographs and found them more offensive than the photographs of nude males involved in this case.

be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene'. Divorced from their 'prurient interest' appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene. See *Parmelee* v. *United States*, 72 App. D.C. 203, 206-208, 113 F. 2d 729, 732-734; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372; *Mounce* v. *United States*, 355 U.S. 180. Were we to hold that these magazines, although they do not transcend the prevailing bounds of decency, may be denied access to the mails by such undifferentiated legislation as that before us, we would be ignoring the admonition that 'the door . . . into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests' (footnote omitted). Roth, at 488." 370 U.S. at 489-491.

The other Justices, comprising the majority, did not discuss this aspect of the case.

As we have seen, in *Mishkin* a majority of the Court held for the first time that "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." 383 U.S. at 508. But *Mishkin* did not discuss the "patently offensive" element of the test.

This Court must decide, in the light of these and other opinions, whether the magazines involved in this case are

patently offensive. It is clear that the representation of male or female nudity is not per se offensive. Museums display paintings, prints and statues of nudes. Many books, especially classics, sold generally to the public, are illustrated with pictures of nude men and women. It is also clear that nude men or women or both may be shown in such positions, poses and settings as to be patently offensive.

Exclusive. The Court is satisfied that the pictures which comprise the magazine *Exclusive* are patently offensive.

International Nudist Sun No. 16 and *Review International No. 6.* In most of the photographs of nude men in those magazines, the models are not engaged in any normal activity, but are so posed as to highlight the genitalia, which are flagrantly displayed.[*] On the other hand, the few pictures in which two men are shown do not directly suggest homosexual activity, unless there are some esoteric ritual positions of which the Court is not advised. The text, although evidently intended to support an argument that the magazines are "sunbathing and nature living" publications, is clearly secondary to the pictures, which are not referred to therein, and no one, however moronic, would pay a high price for the innocuous written material.

In the light of the Supreme Court cases, these two magazines must be regarded as borderline material. The format and contents of the magazines and their high price show that they are designed and imported primarily for sale to homosexuals. It is evident that the commercial importers and distributors of nude pictures and similar material have been pressing further and further beyond the

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[*] In this respect they differ from the illustrations in the bona fide nudist magazines considered by the Supreme Court in *Roaden v. Kentucky*. The nudes shown in those pictures were for the most part engaged in sports and other normal outdoor activities, and the focus was not on the genitalia.

material previously approved by most courts, particularly the Supreme Court, and nearer to or beyond the legal limits, as defined by the Supreme Court. This Court finds as a fact that most people in the United States would consider the magazines to be patently offensive.

The difficult question is whether, in the light of the Supreme Court opinions, the people may be protected from the effect which the importation of such material is likely to have in pushing some of the millions of latent homosexuals over the line, with all the attendant misery and problems, and in defeating the efforts of some of the millions of "bisexual" males to preserve the precarious adjustment they have made. Until the binding authorities are clarified, this Court concludes that the decisions do not prevent it from holding that the material is patently offensive.

(c) Social Importance. The third element of the obscenity test is that the material be utterly without social importance or value. *Roth*, 354 U.S. at 484; *Jacobellis*, 378 U.S. at 191; *The "Fanny Hill" case*, 383 U.S. at 418.

Exclusive contains no text. The statement on the title page that it "has been released by the publishers exclusively to furnish serious artists and persons interested in art, who have some difficulty to find living models, with suitable photographs to be used as substitute for drawing painting and sculpturing," is plainly a subterfuge. The same statement appears verbatim on the title pages of the other "magazines" published by Nordisk Bladcentral, offered in evidence by claimant, imported recently or purchased at the outlets described above. The publication is utterly without social importance or value.

International Nudist Sun No. 16 and *Review International No. 6*. Each claims, in identical material on the title page, to be "the international sunbathing and nature-living monthly magazine". As noted above however, in

the discussion of patent offensiveness, the text, although innocuous and evidently intended to support this contention, is so clearly secondary to the pictures that it may be disregarded. It can have no part in selling the magazines to anyone. The text has no literary significance or social value, and the pictures which are in essence the magazine, are utterly without any artistic significance or other redeeming social value.

Conclusion re Obscenity. The Court concludes that the magazines *Exclusive, International Nudist Sun No. 16* and *Review International No. 6* are obscene within the purview of section 305 of the Tariff Act, 19 U.S.C.A. 1305.

The Court will enter an appropriate judgment order.

(Signed) Roszel C. Thomsen
Chief Judge, U. S. District Court

Order

The Claimant in these libel proceedings having appeared and filed an Answer thereto, argument having been heard in open Court by all parties after trial before the Court sitting without a jury, briefs having been submitted by both sides, and the written Opinion of the Court filed in which the Court concluded that 19 USCA 1305 is not unconstitutional on its face and has not been applied unconstitutionally in these cases and that the magazines involved in said libels are obscene within the meaning of that section,

It is Therefore Ordered, Adjudged, and Decreed by the United States District Court for the District of Maryland, this 6th day of April, 1966, that the magazines mentioned and involved in the above libels are obscene within the meaning of the Tariff Act of 1930 as amended, 19 USCA 1305, and are hereby condemned pursuant to that statute; and all rights, title and interest of any and all persons

therein are hereby forfeited to the United States of America; and

It Is Further Ordered that the United States Marshal in and for the District of Maryland be, and he is hereby authorized and directed to destroy said magazines on May 6, 1966, and that the costs in these proceedings be taxed against the Claimant.

(s) Roszel C. Thomsen
Chief Judge,
United States District Court

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 368

CENTRAL MAGAZINE SALES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-4a) is reported at 373 F.2d 633. The opinion of the district court (Pet. 5a-28a) is reported at 253 F.Supp. 485.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1967 (Pet. 4a). On May 6, 1967, the

Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 15, 1967, and the petition was filed on July 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

QUESTIONS PRESENTED

1. Whether the courts below applied the correct constitutional standards and properly found that the three magazines here sought to be imported were obscene.

2. Whether, as implemented in this case, the administrative and judicial procedures of 19 U.S.C. 1305(a) resulted in an unconstitutional delay in resolving the obscenity issue.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein

without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided * * *

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

On February 3, 1966, two separate shipments consisting of 3600 copies of *Review International No. 6*

and 1000 copies of *International Nudist Sun No. 16*, imported by petitioner from Denmark, arrived at the port of entry at Baltimore, Maryland. Both of these magazines consist of photographs of male nudes and unrelated accompanying text (Tr. 10-11).[1] Between Thursday, February 3 and Tuesday, February 8, these publications underwent normal customs procedures: first, a "line examiner" evaluated the magazines and found them to be probably obscene; then an "appraiser" made a similar determination; and, lastly, a body of Customs officials in Baltmore known as the Obscene Literature Committee concluded that the publications were probably obscene. On February 8, 392 copies of a magazine entitled *Exclusive*, (containing photographs of nude or nearly nude women), also imported by petitioner from Denmark, arrived at the Port of Baltimore (Tr. 10-11).

On that same day and on February 9, a meeting was held in Washington, D.C. between officials of the Bureau of Customs, the Department of Justice and other interested agencies to determine whether forfeiture proceedings should be recommended with regard to these three magazines and other publications and to determine what administrative action should be taken in light of the January 18, 1966 decision in *United States* v. *One Book Entitled "The Adventures of Father Silas", et al*, 249 F.Supp. 911 (S.D.N.Y.), holding that certain existing administrative procedures were unduly time-consuming and in conflict

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[1] "Tr." refers to the transcript of the evidentiary hearing before the district court. "R." will refer to the record of the proceedings in the court of appeals.

with the requirements of 19 U.S. 1305(a) calling for prompt resolution of the obscenity issue. One of the results of this meeting was the recommendation to the United States Attorney for the District of Maryland that he institute forfeiture proceedings as to the instant magazines (Tr. 69-78, 100, 103).[4]

On February 11, the United States Attorney for Maryland filed a libel seeking forefeiture of *Exclusive*, and on February 15, he instituted like proceedings against *Review International No. 6* and *International Nudist Sun No. 16* (R. 7, 9, 11; see also Tr. 107, 110, 146, 152). On February 19, a formal notice of seizure was received by petitioner (Tr. 201), and on February 28, answers to the libels were filed. On March 4, pursuant to the agreement of the parties, the trial judge fixed the trial date as March 9 and on that date and the following day a consolidated trial was held covering the three magazines. Expert testimony was introduced by both sides on the obscenity issue, briefs were filed and oral argument was had (See Tr. 14-15, 21, 25-26, 29-30, 213-214, 219). On March 21, while the case was *sub judice* before the district court, this Court decided *Mishkin* v. *New York*, 383 U.S. 502; *Ginzburg* v. *United States*, 383 U.S. 463; and *Memoirs* v. *Massachusetts*, 383 U.S. 413. On the following day, an application was made by petitioner's counsel to file a supplemental brief discussing these decisions. The application

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[4] It was also decided to discard the procedures found too time-consuming in the *Father Silas* case (see 19 C.F.R. § 12.40 (b-g)), and such procedures were not followed here.

was granted on March 24 and, on March 27, the supplemental brief was filed.

On April 4, the district court issued an opinion holding the magazines obscene and sustaining the Customs obscenity statute, 19 U.S.C. 1305, as constitutional both on its face and as applied in this case (Pet. 5a-28a). The court of appeals affirmed (Pet. 1a-4a).

ARGUMENT

1. In holding that the three magazines here involved were obscene, the district court and the court of appeals determined that the dominant appeal of each was to the prurient interest of the audience for whom it was designed; that each was patently offensive under national community standards; and that each was utterly without redeeming social value. The court below applied the correct constitutional standards (*e.g.*, *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420), and reached a conclusion as to obscenity having ample support in the record.

a. The finding of obscenity as to each of the magazines was correct.[*] While approximately one-half of

[*] There is no merit to petitioner's contention that the materials could not be found obscene because there was no evidence of pandering (see Pet. 16-18). In *Ginsburg* the Court, in considering whether the materials involved had any redeeming social value, did state that "in close cases evidence of pandering may be probative with respect to the nature of the material." 383 U.S. at 474. However in the present case there can be no question that the court below correctly determined that the materials involved are utterly without redeeming social value (Pet. 27a-28a) and the materials themselves

Review International No. 6 and *International Nudist Sun No. 16* contains written material, this material bears little or no relationship to the photographs and obviously is merely "filler" (see the opinion of the district court, Pet. 16a-17a). The primary contents of each magazine are untouched outdoor photographs of nude males not engaged in usual outdoor activities, but posed in standing or sitting positions, in couples or singly, with principal focus on the genital area. Based on these photographs, and the other evidence introduced at trial there was substantial foundation for the rulings that these two magazines appealed to the prurient interests of practicing homosexuals,[4] that they were patently offensive,[5] and that they were utterly without redeeming social value.

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clearly indicate that they are designed to appeal to the prurient interests of the groups for whom they are intended. While the court below did indicate that *Review International No. 6* and *International Nudist Sun No. 16* were probably "borderline material" under the patently offensive test, evidence of pandering would not appear to be relevant on that issue.

[4] The only dispute in the expert testimony in this regard was whether the appeal was of any wider range (Tr. 14-15, 21, 25-26, 213-214, 219); see opinion of the court of appeals Pet. 8a).

[5] On this issue the district court gave close consideration to the various exhibits of other allegedly comparable magazines introduced by petitioner—including those found not to be obscene in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 and *One, Inc. v. Olesen*, 355 U.S. 371. With particular reference to these exhibits, the district court found that the publications involved here "are more offensive" (Pet. 23a; see also 20a-27a).

b. The magazine *Exclusive* consists almost entirely of photographs of nude or nearly nude women.* The findings of obscenity were amply supported by the nature of these photographs—which were accurately described by the court of appeals as follows (Pet. 3a-4a):

> *Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: the model, clad only in a framing garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.

2. There was no inordinate delay in the administrative and judicial proceedings in this case. Within 12 days (eight working days) of the entry of the first of these magazines into the country, the libels were filed in the district court. Some of the time expended in the administrative process, with regard to

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*There is a short paragraph of written material on the title page declaring that the magazine is designed for "serious artists" having difficulty finding models, with the advice that the photographs be used as a "substitute". As the district judge pointed out the "material belies the protestation" which "is plainly a subterfuge" (Pet. 18a, 27a).

the two male nudity magazines, related to initial detention procedures which would normally affect all imported goods. And the two-day administrative conference (February 8-9) can hardly be termed unduly time-consuming since its effect—felt in this case—was the abolition of the slower administrative procedures which had earlier prevailed.

The judicial proceedings were conducted expeditiously. Thus, the delay from February 19, when petitioner was notified of the institution of the forfeiture, until February 28, is attributable to petitioner's need to obtain counsel and file answers to the libel. Trial was had nine days after receipt of the answer. Nor can the trial judge be faulted for not having decided the case in the ten days between the end of the trial and this Court's obscenity decisions of March 21, 1965. During this ten-day period, the trial judge had to weigh somewhat conflicting expert testimony; to compare numerous exhibits with the material in issue; and to decide the question (not raised here) as to the constitutionality on its face of the Customs statute, 19 U.S.C. 1305. Considering further, as the district court noted (Pet. 13a), that none of the magazines here involved would become obsolete or unsaleable upon appearance of the following issue, the court's desire for reflection was surely not unreasonable. Of course, as petitioner's counsel recognized in requesting leave to file an additional brief, additional evaluation became necessary following this court's decisions in *Mishkin*, *Ginzburg*, and *Memoirs*. An examination of the thorough opinion of the district court fully supports the judgment of

the court of appeals that "[e]arlier adjudication accompanied by an enlightening opinion could not reasonably have been expected" (Pet. 2a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CENTRAL MAGAZINE SALES, LTD. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 368. Decided October 23, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup* v. *New York*, 386 U. S. 767.

MR. JUSTICE HARLAN concurs in the judgment of reversal upon the premises stated in his separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, 457.

THE CHIEF JUSTICE believes this case is controlled by *Roth* v. *United States*, 354 U. S. 476, and the judgment should be affirmed in accordance with the principles enunciated in the opinion of the Court in that case.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.